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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1257

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT,

Petitioners,

—v.—

LEONARD H. CHAPMAN, as Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RODOLPHE NOEL, EMIRIS NOEL,
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-v.-

LEONARD H. CHAPMAN, as Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered on January 3, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 508 F.2d 1023 (2d Cir. 1975) and is set forth in the Appendix, infra, p. 1a. The opinion of the District Court for the Southern District of New York is reported at 376 F.Supp. 1095 (S.D.N.Y. 1974) and is set forth in the Appendix, infra., p. 17a.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on January 3, 1975. The jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Respondents policy routinely denying extended voluntary departure to Western Hemisphere close relatives of resident aliens which requires the breaking up of their families for extended periods of time, could be justified by the equal protection principles of the Fifth Amendment in view of the fact that the close relatives of citizens in exactly the same position could remain together.

2. Whether the operating instructions which implemented Respondents' discriminatory

policy are void as violative of the rule-making procedures of the Administrative Procedure Act?

STATUTORY PROVISION INVOLVED

5 U.S.C. Section 553(b) and (c):

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply -
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

STATEMENT OF THE CASE

Petitioners Rodolphe Noel and Antoine Petit are aliens and citizens of Haiti. Petitioners Emiris Noel and Yanick Petit are their lawful, permanent resident alien spouses. Rodolphe Noel entered this country on May 24, 1969, overstayed and was ordered deported on July 12, 1973. Pursuant to 8 U.S.C. §1254, he requested an extension of time to depart for an indefinite period until he obtained an immigrant visa because of his marriage on April 13, 1973 to petitioner Emiris Noel.

Similarly, Petitioner Noel Petit was admitted here on August 4, 1970, overstayed and was ordered deported on August 6, 1973. He also requested extended voluntary departure because of his marriage on June 26, 1973 to Petitioner Yanick Petit.

Such extensions were and are routinely granted all deportable aliens married to American citizens and thereafter applying for immigrant visas. The policy of the Immigration and Naturalization Service (hereafter INS) in the New York district between 1968 and June, 1972 was to permit Western Hemisphere aliens,[1] such as Noel and Petit, who were in this country and married to permanent resident aliens, to remain in this country on extended voluntary departure until an immigrant visa became available. However, on July 17, 1972 the INS issued new "operating instructions" which were released on July 17, 1972 and which were implemented on August 1, 1972. These operating instructions which were never published in the Federal Register and for which no lawful rule-making procedure was implemented, created a wholly new policy for treatment of requests for stay of deportation by intending Western Hemisphere immigrants. Those married

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1/ Eastern Hemisphere close relatives of resident aliens are granted preferences in the granting of visas and are treated similarly to the close relatives of American citizens. See 8 U.S.C. §1153(a)(2) and 8 U.S.C. §1182 (a)(14).

to American citizens continue routinely to enjoy stays of deportation as they did under previous INS policy. Those married to lawful resident aliens are routinely denied stays of deportation pending visa issuance, except in cases of the most extreme hardship.

After objection by Congressman Rodino (see Appendix, infra, p. 29a) INS issued new instructions on April 10, 1973 providing that extended voluntary departure would be granted to close relatives of permanent resident aliens who were present in the United States and who had the requisite family status on or before April 10, 1973. If they occurred afterwards (as in the case of both the Noels and the Petits) departure would not be deferred.

This action was commenced on August 24, 1973 by the filing of a complaint and an order to show cause to bring on a motion for a preliminary injunction against the INS policy. On February 8, 1974, the district court denied the motion for a preliminary injunction. On appeal, the United States Court of Appeals for the Second Circuit affirmed the denial of the motion on the ground that Western Hemisphere aliens were coming to the United States in large numbers and adversely affecting the domestic labor market. Thus the policy bore "a rational and substantial relationship to the avowed purpose of Congress to protect the American economy." It further held that the operating instructions were "general statements of policy" and thus exempt from the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. §553(b) and (c).

REASONS FOR GRANTING THE WRIT

1. The INS Policy under Review Violates the Equal Protection Principles of the Fifth Amendment.

This case involves an attack upon a harsh and discriminatory Immigration and Naturalization Service Policy that requires the families of lawful resident aliens to be split up for extended periods of time while the families of American citizens in exactly the same position can remain together, thus violating basic equal protection principles. The policy is sanctioned by no Act of Congress, in fact the House of Representatives has acted to overrule the policy.2/ It directly conflicts with a

2/ H.R. 981 (93d Cong. 1st Sess.) was passed by the House on September 26, 1973 by a vote of 336 to 30. 119 Cong. Rec. H.8346 (daily ed. Sept. 26, 1973). The bill would grant preferences in the grant of immigrant visas to all immediate family members of both citizens and lawful resident aliens. This would eliminate the long wait for immigrant visas by Western Hemisphere family members described in the text. This purpose was outlined by Congressman Frey just before the House voted on the bill: "H.R. 981 will give top priority to reuniting families by applying the Eastern Hemisphere preference system to Western Hemisphere immigrants." Ibid. H.8346.

prime policy of the Immigration laws and the essential purpose of the INS rules implementing these laws. As Representative Peter W. Rodino, Jr. (then Chairman of the House Judiciary Subcommittee on Immigration and Nationality) has written in an attempt to have the former INS Commissioner Raymond F. Farrell repeal the policy at issue in this case:

> "I feel certain that you will agree that this course of action [revoking the policy] will alleviate much hardship and that the interest of humanity will be better served. The uniting of families has been paramount in all consideration of legislation in the field of immigration." Letter of Peter J. Rodino, Jr. to Raymond F. Farrell, dated March 28, 1973, Exhibit C to Affidavit of Austin T. Fragomen, Jr., in Support of Motion for a Preliminary Injunction, attached herein at 29a.

Thus, this case presents to this Court the question of how far the federal government, through administrative action, may burden resident aliens with a harsh and discriminatory policy that does not apply to citizens, that does not have any basis in law and that serves no rational governmental purpose. In this respect it presents an issue similar to the one before this Court in Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), Graham v. Richardson, 403 U.S. 365 (1971), Sugarman v. Dougall, 413 U.S. 634 (1973) and In re Griffiths, 413 U.S. 717 (1973). In each of those

cases, this Court held that the states could not restrict resident aliens from employment opportunities, welfare benefits, civil service appointment or bar admission that were available to citizens.

More recently this Court has examined how far the federal government may infringe the rights of aliens pursuant to Congressional enactment. Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir. 1974), cert. granted, 417 U.S. 944 (1974), restored to the calendar for reargument, 43 U.S.L.W. 3474 (March 3, 1975); Diaz v. Weinberger, 361 F.Supp. 1 (S.D. Fla. 1973) prob. juris. noted 416 U.S. 980 (1974), restored to the calendar for reargument, 43 U.S.L.W. 3474 (March 3, 1975). See also Ramos v. United States Civil Service Comm'n, 376 F.Supp. 361 (D.P.R. 1974).

The cases cited above stand for the proposition that neither the state nor the federal government may treat citizens and lawful resident aliens differently with respect to certain rights or benefits unless a clear legitimate governmental purpose requires a contrary result.

Petitioners here do not challenge the basic division made in the immigration laws between citizens and aliens, nor the elaborate procedures governing both immigration and naturalization. Obviously, distinctions based upon citizenship lie at the heart of the immigration act. But once a person has fulfilled the requirements of the law and acquired resident status, awaiting only the passage of time

before he becomes a citizen, the federal government may not impose irrational burdens upon him by administrative action.

It seems incontrovertible that the INS policy at issue violates the equal protection principles of the due process clause of the Fifth Amendment in at least three different ways:

First, the policy violates this Court's explicit holding that "classifications based on alienage are 'subject to close judicial scrutiny'." Sugarman v. Dougall, 413 U.S. 634, 642 (1973).

Secondly, the policy attacks the alien relatives and the resident alien spouses fundamental right to remain in this country and to remain united with their family members. See Loving v. Virginia, 388 U.S. 1, 12 (1967); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Thirdly, the policy is a classic example of a weak, discrete and insular minority being severely punished by administrative action while a larger group in precisely the same situation, but possessed of stronger political power, is left alone.

This Court in Sugarman indicated that discrete and insular minorities, such as aliens, can secure the assistance of federal courts applying equal protection principles, quoting from United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938). A fortiori, an administrative practice not sanctioned

by any statute that restricts the rights of such minorities must be carefully examined.

The INS and the court below sought to justify the policy on the ground that it was in furtherance of a Congressional purpose and constituted an effort to protect the American labor market from competition by the close relatives of resident aliens. Neither justification can be supported.

The legislative history of the 1965 amendments to the Immigration and Nationality Act (Senate Report No. 748, 89th Cong. 1st Sess., Sept. 15, 1965. U.S. Code Congr. & Admin. News, 3328-3370).shows Congress' intent to grant preferential admission to aliens based on family relationships with either U.S. citizens or permanent resident aliens. In fact, the concepts of close relatives of citizens and close relatives of permanent residents are always linked together in a single thought:

> In place of the National Origins System, the Bill establishes a new system of selection designed to be fair, rational, humane, and in the national interest. Under this system emphasis in the selection for among those eligible to be immigrants within the annual numerical ceiling of 170,000...will be based on the existence of a close family relationship to U.S. citizens or lawful resident aliens regardless of the birthplace of the alien. Reunification of families is to be the foremost consider-

> ation. The **closer** the family relationship the higher the preference. (U.S. Cong. & Admin. News 1965 p. 3352) (Emphasis added).

The statement shows a clear Congressional intent to keep families united. In expressing such intent, the Legislative report invariably links together close relatives of citizens with close relatives of permanent residents. While it is true that the immediate relatives of citizens are given a higher level of priority, it is clear that Congress was motivated by the same spirit and the same humanitarian goals in providing immigration benefits for both the relatives of citizens and the relatives of aliens.

The INS argument that the policy in question is a reasonable manner of protecting the American labor market is also invalid. The policy is both underinclusive and overinclusive and therefore is irrational in equal protection terms. It is overinclusive since it demands that all Western Hemisphere close relatives of resident aliens leave the country whether or not they may be in the labor market. Thus, the Service has established the most pernicious and inexpedient method for dealing with any alleged labor problem. Instead, it could refuse employment authorization for aliens awaiting visa availability, or it could require a non-employment bond as a condition of continued presence in the United States. Instead, it established a blanket requirement that all alien relatives of resident aliens must leave the country

whether or not they are working or whether or not their employment would hurt the labor market in any way.

Furthermore, the policy is underinclusive. If the Service were really concerned about protecting American citizens from job competition from aliens who have not yet achieved immigrant status, it should insist that all alien relatives of citizens also leave the country. Since there are 200,000,000 citizens and only 4,000,000 resident aliens the former constitute a far larger target group for illegal aliens marrying Americans and remaining here to work. Yet the Service has explicitly rejected the latter alternative.

In addition the alien relatives of resident aliens will eventually return to the United States when their immigrant visas are issued and enter the labor market then. Thus the Service policy is not rationally related to its alleged purpose and goal.

2. The Operating Instructions Which Implemented Respondents' Discriminatory Policy Violated the Administrative Procedure Act.

An essential feature of the Administrative Procedure Act [5 U.S.C. §551 et seq.] is the requirement that agencies enact rules in a manner designed to insure that the public will be aware of the promulgation of a rule and will be given an opportunity to

participate in the rulemaking process and to plan their activities in anticipation of the new rule. To effectuate these ends, an agency is required under 5 U.S.C. §553 to publish general notice of proposed rule-making in the Federal Register at least 30 days in advance of the adoption of the proposed rule, and to provide an opportunity for interested persons to participate in the rule-making process through the submission of written data, views or arguments. Exceptions to the rule-making requirement are made in case of "interpretive rules, general statements of policy, rules of agency organization procedure or practice". Under 5 U.S.C. §551(4), a rule is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." "Rule-making" is defined under the same section as "agency process for the formulating, amending or repealing of a rule."

Analyzed in terms of the definition of "rule" in the Administrative Procedure Act, there is no question that the INS "instruction" of July 17, 1972, and subsequent instructions were "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy". In this regard, the fact that INS chose to call these pronouncements "instructions" does not make them any less rules. In fact, courts have consistently held that it is not the

label a particular agency puts upon a given exercise of agency power which is conclusive, but rather that it is what the agency actually does which controls. See Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 416 (1942). Here, the instructions were clearly given general applicability and future effect, as to a specific clearly defined class of aliens. The standards by which stays of deportation were to be granted or withheld were sharply modified as to Western Hemisphere natives with alien permanent resident relatives in the United States. In fact, it is clear that INS itself recognized that it was promulgating a new rule which would change the existing rights of a large class of people by providing that cases with dispositions made prior to the effective date, August 1, 1972, would not be disturbed, and that the same would be true of "pipeline" cases in progress.

The court below improperly held that the operating instructions were exempt as "general statements of policy." Furthermore, the court said, the operating instructions did not meet the "substantial impact test" which "places within the rulemaking procedure only those rules which have a 'substantial impact on those regulated'" Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3rd Cir. 1969), that is, rules that change "existing rights and obligations," Lewis Mota v. Secretary of Labor, 469 F.2d 478, 482 (2d Cir. 1972).

But it cannot be denied that petitioners had pre-existing expectations which were extinguished by administrative fiat. Clearly, if petitioners had known of respondents intentions prior to the change, the petitioners might have married prior to the cut-off date of April 10, 1973. Clearly, if Notice of Proposed Rulemaking had been published by INS, the public would have been given an opportunity to respond and submit views prior to the implementation of a new policy affecting the future rights of a large number of lawful permanent resident aliens who might marry non-resident aliens.

In a recent case involving the Board of Parole, which has similar broad discretion with respect to the persons under its supervision, the Court of Appeals for the District of Columbia concluded that regulations dealing with the determination of eligibility for parole were not general statements of policy and thus exempt from the APA rulemaking requirements. Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974). Since the determination of eligibility factors has "significant consequences" for prisoners, they constituted "substantive agency action, for they define a fairly tight framework to circumscribe the Board's statutorily broad power." Id. at 1113.

Similarly in this case, the new operating instructions had a broad impact on

those subject to the district director's broad discretion to grant extended voluntary departure. Restriction of that discretion, just as restriction of the discretion to grant parole, is a rule that requires the advance notice specified by the APA. The failure to publish in accordance with the relevant statutory criteria rendered the operating instructions invalid.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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